> The Closing Agreement, however, expressly released all "grievances and claims relating to the plant closing and the contract." The Closing Agreement appears on its face to be a valid and binding collective bargaining agreement which expressly precludes Plaintiffs' claim that Baskin-Robbins breached the 1998 CBA. Thus, in order to prevail on their claims here, the Plaintiffs must prove that the Closing Agreement is not valid and binding. Like the district court in *Adcox*, however, this Court lacks jurisdiction to determine the validity of the Closing Agreement.

6a, Memorandum Opinion and Orders, July 23, 2003, at 13a.

The members appealed to the United States Court of Appeals for the Sixth Circuit. R. 87, Notice of Appeal, August 13, 2003. Between the end of the briefing period and oral argument, the Sixth Circuit decided *Bauer v. RBX Industries, Inc.*, 368 F.3d 569 (6th Cir. 2004). Intriguingly, the *plaintiffs* in *Bauer* were challenging whether the district court had jurisdiction to decide their claims based on a collective bargaining agreement *they agreed* had subsequently been superceded by a plant closing agreement, an odd procedural context that might have influenced the outcome. The Sixth Circuit summarily relied on *Adcox* and *Heussner* in holding that the district court had lacked jurisdiction in *Bauer*, relegating discussion of the implications of *Textron* to a mere footnote. *Bauer*, 368 F.3d at 579 n.5.

That footnote claimed that the *Textron* explanation was simply a "lone ambiguous statement" the Sixth Circuit would not follow. *Id.* The *Bauer* footnote also did

not address the extensive analysis of district court jurisdiction in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) nor did it mention the direct conflict it had created with the Seventh Circuit's decision in *International Union of Opr. Engr. v. Rabine*, 161 F.3d 427 (7th Cir. 1998).

In this case, the Sixth Circuit summarily relied on *Bauer* and held that the district court had not had jurisdiction of the case. *Burklow v. Baskin-Robbins*, No. 03-6115 (6th Cir. Jan. 12, 2005) The members requested rehearing *en banc* so that the Sixth Circuit could consider overruling the *Bauer* case on which the result in this case was premised. Their request was denied.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This does not mean that a federal court can never adjudicate the validity of a contract under § 301. That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus, *if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid the court may, consistent with §301(a), adjudicate that defense.*

Textron Lycoming Recip. Eng. v. Auto. Workers, 523 U.S. 653, 658 (1998) (emphasis added).

> "Likewise [to *Textron Lycoming Recip. Engine Div. v. Auto. Workers*, 523 U.S. 653 (1998)], in this

> case, the defendants' invalidity defense to the Union's enforcement action was properly before the district court and is properly before this court. The success or failure of the defense does not affect either court's jurisdiction to consider it."

Int'l Union of Opr. Engr. v. Rabine, 161 F.3d 427, 431 (7th Cir. 1998) (clarification added)

> "Comparing (1) our precedents in Adcox and Heussner and (2) the general principle that federal courts have limited jurisdiction in this area, with *a lone ambiguous statement of the by the Supreme Court* [in *Textron Lycoming Recip. Engine Div. v. Auto. Workers*, 523 U.S. 653 (1998)], we believe that our prior rulings that a federal court does not have jurisdiction to hear a § 301 claim premised upon an [allegedly] expired or superseded contract are still binding on us."

Burklow v. Baskin-Robbins, No. 03-66115 (6th Cir. 2005) (quoting *Bauer v. RBX Industries, Inc.*, 368 F.3d 569, 579 n.5 (6th Cir. 2004)) (clarification added)

This appeal raises yet again "the troublesome question of when it is proper to characterize something as a defect in subject matter jurisdiction, and when the problem is really a failure to state a claim." *Int'l Union of Operating Engineers v. Rabine*, 161 F.3d 427, 431 (1998). It addresses the extent of the jurisdictional grant in § 301 of the Labor-Management Relations Act for violations of contracts that also require consideration of whether a contract is valid.

Plaintiff-Appellants' position is that this Court's decision in *Textron Lycoming Engine Div. v. UAW*, 523 U.S. 654 (1998) held that the district court had jurisdiction in this case. The United States Court of Appeals for the Seventh Circuit agrees. *Int'l Union of Operating Engineers v. Rabine*, 161 F.3d 427 (7th Cir. 1998). Numerous courts of appeals now apply similar reasoning, following this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The United States Court of Appeals for the Sixth Circuit has instead held twice that *Textron*'s explanation of its holding is a "lone ambiguous statement" it need not follow. *Burklow v. Baskin Robbins*, No. 03-6115 (6th Cir. Jan. 12, 2005); *Bauer v. RBX Industries, Inc.*, 368 F.3d 569, 579 n.5 (6th Cir. 2004).

This Court should issue a writ of certiorari to the Sixth Circuit Court of Appeals to resolve the following as to this important matter of federal question jurisdiction:

- its direct conflict with this Court's own decision in *Textron*;
- its direct conflict with the Seventh Circuit Court of Appeals;
- its conflict in principle with this Court's decision in *Steel Co.*; and,
- its conflict in principle with several other courts of appeals.

I. THE SIXTH CIRCUIT'S DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH THIS COURT'S RULING IN *TEXTRON LYCOMING ENGINE DIV. V. UAW.*

Few questions that come before this Court are more important than the extent of federal jurisdiction. *Steel Co.*, 523 U.S. at 94-95. Jurisdictional issues go to the heart of the integrity and proper functioning of the federal judiciary, and maintenance of both are among this Court's prime responsibilities. *Id.* at 94-95, 101. That jurisdictional questions may be raised *sua sponte* or at any time in a proceeding is indicative of their importance. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). This Court's own rules, which require that litigants demonstrate both its jurisdiction and that of the courts below, demonstrate the seriousness of its commitment to maintaining the integrity of all federal court decisions. *See, e.g.*, Sup. Ct. R. 13(2), 14(e), & 14(g)(ii). But it is just as important for a district court to decide a case on the merits if it has jurisdiction as it is for a court to eschew merits issues if it lacks jurisdiction. In one of this Court's earliest cases, it stated:

> We have no more right to decline jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

Cohens v. Virginia, 6 Wheat. 264 (1821). This view has not changed or weakened in the slightest. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)) ("the federal courts'

obligation to adjudicate claims within their jurisdiction is 'virtually unflagging'").

This Court can hardly have said it more bluntly: "jurisdiction matters," whether it exists or it does not, and it matters first of all. *E.g.*, *Steel Co.*, 523 U.S. at 101.

These are the stakes here, where the Sixth Circuit ignored the import of this Court's decision in *Textron Lycoming Recip. Engine Div. v. UAW*, 523 U.S. 653 (1998) that leaves no doubt of the district court's jurisdiction to decide this the merits. Instead, the district court dismissed for lack of subject matter jurisdiction and the Sixth Circuit affirmed. Those decisions directly conflict with *Textron*, and this Court should take the opportunity to overrule them.

The employees in this case claimed a right to recover under § 301(a) of the Labor-Management Relations Act which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). As this Court explained in *Textron*, it is not sufficient that the suit be simply to determine the validity of a contract for the district court to have

jurisdiction under § 301; the plaintiff's suit must allege and be *for* a violation of a contract.

This case is a suit for violation of a contract. The face of the employees' complaint described two key violations of the 1998 Agreement, which form the central cause of action in the complaint, and they alleged another in their response to Baskin Robbins' motion for summary judgment. R. 29, Second Amended Complaint, at ¶ XV; R. 75, Memorandum in Response to Defendants' Motion for Summary Judgment, at 14-15.

On the other hand, Baskin Robbins' primary factual defense[1] to the members' claims was that the subsequent "plant closing agreement" was valid, and therefore, the 1998 Agreement was not valid. R. 42, Memorandum in Support of Defendant Baskin Robbins USA, Co's Motion for Summary Judgment, at 22-27.

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[1]Both the district court and the Sixth Circuit thought *Textron* was distinguishable on the basis that Baskin Robbins had not actually pled contract invalidity as an affirmative defense in its answer. *See* 6a, Memorandum Opinion and Orders, July 22, 2003, at 22a, n.1 ("Defendants do not assert any affirmative defenses relating to the validity of the Closing Agreement. Thus, *Textron* is inapposite . . ."); *Burklow v. Baskin Robbins*, No. 03-6115 (6th Cir. Jan. 12, 2005) (adopting district court opinion). This technicality of pleading ought not detain the Court. First, *Textron*'s precise list of examples was not exhaustive or technical, and Baskin Robbins' position is plainly to contest the validity of the 1998 Agreement. *See Textron*, 523 U.S. at 658. Second, in the process of following this Court's companion jurisdictional ruling in *Steel Co.*, the Second Circuit held that district court jurisdiction "is not defeated by the defendant's assertion of a position that is *properly characterized* as an affirmative defense." *In re Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 150-51 (2d Cir. 2003) (emphasis added).

Nevertheless, this Court was clear that this defense does not rob the district court of its jurisdiction:

> This does not mean that a federal court can never adjudicate the validity of a contract under § 301(a). That provision simply erects a gateway through which the parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse.

Textron, 523 U.S. at 657-58. The decision then lists two examples of situations in which a district court could properly determine the validity of a contract, one of which was precisely on point with what occurred in this case:

> Thus if in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, *the defendant interposes the affirmative defense that the contract was invalid*, the court may, consistent with § 301(a)), adjudicate that defense.

Id. at 658. Therefore, despite Baskin Robbins' defense of contract invalidity, *Textron* still holds that the district court did have jurisdiction of the case.

Both the district court and the Sixth Circuit held that subject matter jurisdiction did not exist, in direct conflict with *Textron*. The Sixth Circuit stated that it was constrained by a prior opinion of another panel in *Bauer v. RBX Industries*, 368 F.3d 569 (6th Cir. 2004) which considered *Textron* cursorily in a mere footnote. *Burklow*, No. 03-6115, at 2. The members did suggest rehearing *en banc* in this case but were denied. In *Bauer*,

plaintiff union members sought to subvert an unfavorable ruling on their own § 301 claims on the basis that the decision been entered in the absence of jurisdiction, because after the complaint had been filed but before receiving the district court's ruling, the collective bargaining agreement alleged to have been violated was superceded by a plant closing agreement. *Bauer*, 368 F.3d at 577-78.

Despite *Textron*'s specific example that is on point with the facts in this case, the Sixth Circuit's *Bauer* panel saw multiple interpretations of this Court's intentions:

> One reading of this dicta is that a federal court may possess jurisdiction over a plaintiff's § 301 claim based on a violation of a [collective bargaining agreement], but the defendant may raise the affirmative defense of the invalidity (here expiration or supersession) of the [collective bargaining agreement]; in such a case the federal court could dismiss the claim because relief cannot be granted for the violation of a contract that no longer exists. Another reading of this quotation is that federal courts only possess jurisdiction to rule that a contract is invalid because of some defect, *e.g.* lack of consideration or anticipatory breach, but that federal courts do not have jurisdiction when there is no dispute that the contract in question does not exist.
>
> Comparing (1) our precedents in *Adcox* and *Heussner* and (2) the general principle that federal courts have limited jurisdiction in this area, with a *lone ambiguous statement by the Supreme Court*, we believe that our prior rulings that a federal

> court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract are still binding on us.

Bauer, 368 F.3d at 579.

Those prior Sixth Circuit rulings that *Bauer* upheld and that were adopted in the decision below squarely conflict with *Textron*. They hold that if a district court must decide whether a collective bargaining agreement either exists or is valid in the process of deciding a suit for violation of a collective bargaining agreement, the district court lacks jurisdiction. *Adcox v. Teledyne*, 21 F.3d 1381, 1386 (6th Cir. 1994); *Heussner v. National Gypsum Co.*, 887 F.2d 672, 675-76 (6th Cir. 1989). The decision below is the same. *Burklow*, No. 03-6115, at 2. *Textron*, however, holds that as long as the suit is one for violation of a collective bargaining agreement, the district court has the power to decide issues such as the existence or validity of a contract along the way. *Textron*, 523 U.S. at 658. This Court should issue a writ of certiorari to resolve this dispute between *Textron* and the Sixth Circuit's decision in this case.

II. THE SIXTH CIRCUIT'S DECISION CREATES A DIRECT CONFLICT WITH A PRIOR DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS.

The Sixth Circuit's decision in this case directly conflicts with the Seventh Circuit's 1998 decision explicitly following *Textron*, *International Union of Opr. Engr. v. Rabine*, 161 F.3d 427 (7th Cir. 1998). The *Rabine* union-plaintiff sued under § 301 for violation of what it believed was a collective bargaining agreement made with its employer. Problem: the party with whom the

union had made the agreement was not an "employer" under § 301(a). The so-called employer eventually proved he was not an "employer" so that there could be no "contract[] between an employer and a labor organization" as required for federal court jurisdiction under § 301(a). The Seventh Circuit saw this argument for what it was: a defense of invalidity of the alleged contract. *Rabine*, 161 F.3d at 431. It applied *Textron*'s holding that federal courts did have jurisdiction over § 301 cases in which defendants raised the defense of contract invalidity and held that whether a contract existed went to the merits of the case, not to jurisdiction. *Id.* at 430-31.

The *Rabine* holding cannot be reconciled with the decision below in this case. Here, the Sixth Circuit upheld dismissal of the case for lack of subject-matter jurisdiction, because "a federal court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract." *Burklow*, No. 03-6115, at 2 (quoting *Bauer*, 368 F.3d at 379 n.5). But to know if a contract is "expired or superceded," a court must make that factual finding. Such a factual finding is nothing more than a determination that a contract is valid, and therefore, merely a consideration of an invalidity defense. *Rabine* squarely held that invalidity defenses are within a district court's jurisdiction. *Rabine*, 161 F.3d at 431.

True, in *Rabine*, no alleged subsequent contract existed, but a defense that "contract A is invalid" is no different in substance from a defense that "contract B supercedes contract A rendering contract A invalid." They are different words for the same thing: "contract A, the contract on which the suit is brought, is invalid." Regardless even of a finding that contract B supercedes contract A - that contract A is invalid - which was never

even made in this case, *Rabine* holds that a district court has jurisdiction of such a case. *Rabine*, 161 F.3d at 430-31. Whether contract A actually is invalid goes to the merits, not jurisdiction. *Id.* at 430. Unfortunately for the *Rabine* plaintiffs, there was no doubt that "contract A" was, in fact, invalid. By contrast, "contract A's validity" was hotly disputed between the parties here.

The Seventh Circuit was well aware it was exploring the limits of federal jurisdiction in *Rabine*, but it could not justify a holding in which a district court could not even determine if it had jurisdiction simply because a defendant in a § 301 case interposed an invalidity defense. *Rabine*, 161 F.3d at 431. Few questions could be more important to the integrity of the federal court system than its ability to determine its jurisdiction at all. If a court cannot determine its own jurisdiction, it may fail to decide cases when it *does have* jurisdiction. Abrogating its "virtually unflagging" obligation to adjudicate a claim within its jurisdiction, *Morros*, 268 F.3d at 703, is just as serious as a district court deciding a case of which it does not have jurisdiction.

The Seventh Circuit got it right. *See infra* section III. The Sixth Circuit's rulings in *Bauer* and in this case that a federal court does not have jurisdiction to hear a § 301 suit for violation of a collective bargaining agreement that may, but has not yet been determined to be, expired or superseded, means the district court lacks power to determine its own jurisdiction. All a defendant employer must do is *allege* that another agreement that appears on its face to be the most current agreement actually is the most current agreement and district court jurisdiction disappears. *See Adcox v. Teledyne*, 21 F.3d 1381, 1386 (6th Cir. 1994). This cannot be the law.

Worse, the conflict between the Sixth and Seventh Circuits is now on the verge of bleeding into other areas of the law and invading what uniformity in this area of law does exist. *Textron* had given two examples of situations in which a district court might be asked to rule on the validity of a collective bargaining agreement that would not rob that court of jurisdiction if the suit involved was otherwise one for violation of such an agreement. The first is the source of the conflict between *Burklow/Bauer* and *Rabine*. The second occurs when a declaratory judgment plaintiff accused of violating a collective bargaining agreement asks a court to declare the agreement invalid. *Textron*, 523 U.S. at 658. Earlier this year, the Seventh Circuit followed this second example to find jurisdiction where an employer was accused of violating a collective bargaining agreement and sought a declaratory judgment that the relevant agreement was no longer in effect. *J. W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Workers, Local Union 1*, 398 F.3d 967 (2005). No longer can the pretense that a mere quibble over "a lone ambiguous statement" divides the two circuits; they are now clearly applying a key Supreme Court precedent defining the jurisdictional reach of an important federal statute in opposite ways.

This Court should issue a writ of certiorari to the Sixth Circuit to resolve this inter-circuit conflict.

III. THE SIXTH CIRCUIT'S DECISION CREATES A CONFLICT IN PRINCIPLE WITH THIS COURT'S DECISION IN *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*

Much jurisprudential ink has been spilt on the distinction between whether a federal district court has subject matter jurisdiction of a case and whether the case itself should be successful on the merits. The number of cases both in this Court and in courts below testify to the importance of this issue and the confusion it creates. *See, e.g.*, cases cited *infra* at IV.

Nevertheless, this Court clearly defined the distinction in a case handed down in the same Term as *Textron*: *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998). "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89. District courts have jurisdiction of a case if the complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States" with only the narrowest exceptions. *Bell v. Hood*, 327 U.S. 678, 681-83 (1946). The analysis bogs down where "the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal cause of action," but if the complaint is drawn to seek recovery under federal law or the constitution, the district court properly exercises subject matter jurisdiction of the case. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir. 1996). "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause

of action on which petitioners could actually recover." *Bell*, 327 U.S. at 682.

Steel Co. is but one of this Court's most recent of many efforts to give a clear explanation of the difference between a lack of subject matter jurisdiction and a failure to state a claim where statutory grants of jurisdiction are at issue. *See also Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). It provided a comprehensive analysis of the implications of the well-established test: that a claimant states an arguable cause of action, giving a district court federal question jurisdiction, "if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.*, 523 U.S. at 89.

The members below did state an arguable cause of action. They alleged that a collective bargaining agreement had been violated by their employer. R. 29, Second Amended Complaint, at ¶ XV; *see also* 29 U.S.C. § 185. If a court rules that the word "contract" in § 301 may be construed to include the 1998 Agreement, due perhaps to the invalidity of the plant closing agreement, the plaintiffs may be entitled to recover on their hybrid claim. They have satisfied the test: they have shown they have a right to recover if the laws of the United States are given a particular construction. *See Steel Co.*, 523 U.S. at 89.

By contrast, the defendants have merely defended the case by challenging the existence of an element of the members' claim: that the contract on which the members are suing exists or is valid. They have not even yet

shown that the contract is not valid. This certainly no jurisdictional issue. *Steel Co.*, 523 U.S. at 89. At best, defendants have a motion for summary judgment on the merits where the facts are plainly in dispute.

The district court, and the Sixth Circuit in adopting the district court's reasoning, converted a question of whether a claim had been stated - whether the contract on which the members were suing was actually a contract between the parties - into a jurisdictional issue, ignoring *Steel Co.*'s insistence that lower courts avoid this analytical pitfall. *Steel Co.*, 523 U.S. at 92-93. As *Steel Co.* explained, "the consequences alone are enough to condemn" turning every question of whether a cause of action has been stated into a jurisdictional question. *Id.* at 92. Not only would every element of a cause of action have to be considered as a jurisdictional question, courts would be required to raise them *sua sponte*! *Id.* at 93. "Congress of course did not create such a strange scheme." *Id.* at 93. In referring to actions brought under a particular statute, this Court explained that this means "suits *contending*" that certain facts necessary to state a claim are true. *Id.* (emphasis in original).

The members' suit *did* contend that a valid collective bargaining agreement had been violated, just as § 301 requires. Yet, the district court and Sixth Circuit found a lack of subject matter jurisdiction anyway, in contradiction of the analysis *Steel Co.* requires.

The differences between subject matter jurisdiction and the question of whether a plaintiff has stated a claim are not "legal niceties." *Steel Co.*, 523 U.S. at 101. Jurisdictional questions implicate "the statutory

and (especially) constitutional elements of jurisdiction [that] are an essential ingredient of separation and equilibrium of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 523 U.S. at 101. Moreover, if the district court *does* have jurisdiction, issues of separation and equilibrium of powers are still implicated if a district court does not exercise jurisdiction it has, because the district court has abrogated its "unflagging" duty to hear the case. *New Orleans Pub. Serv.*, 491 U.S. at 359. Federal courts must honor "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within constitutionally permissible grounds. *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). Congress set those bounds in the Labor-Management Relations Act, and the members here pled an arguable cause of action based on that statute's requirements. In holding no federal jurisdiction of their case exists, the Sixth Circuit strayed from the boundaries established in this Court's precedents and reiterated especially clearly in *Steel Co.* This Court should issue a writ of certiorari to make the difference between jurisdiction and whether a claim has been stated crystal clear once again.

IV. THE SIXTH CIRCUIT'S DECISION CREATES A CONFLICT IN PRINCIPLE WITH NUMEROUS OTHER CIRCUITS.

By straying from *Steel Co.* and *Textron*, the Sixth Circuit has now strayed from numerous circuit courts of appeals that have reaffirmed or adjusted their analysis of the difficult but critical distinction between the failure to state a claim and subject matter jurisdiction pursuant to

statutory grants since *Steel Co.* and *Textron.* These circuits include the First (*U.S. v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1 (1st Cir. 2005)), Second (*Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358 (2d Cir. 2000)), Third (*Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3d Cir. 2003) and *In re Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134 (2003)), Fourth (*Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001)); Seventh (*J.W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Workers*, 398 F.3d 967 (2005)), Eighth (*Novartis Seeds, Inc. v. Monsanto Company*, 190 F.3d 868 (1999) and *Godfrey v. Pulitzer Publishing Co.*, 161 F.3d 1137 (8th Cir. 1998)), Ninth (*U.S. v. Morros*, 268 F.3d 695, 699-703 (9th Cir. 2001)), Tenth (*Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999)); and D.C. (*Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 f.3d 1123, 1134 (D.C. Cir. 2004)). The *Steel Co.* principles are so imbedded in many circuits' jurisprudence, that some courts are simply relying upon their own precedent correctly describing the *Steel Co.* analysis without mentioning the Supreme Court case. *E.g., Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038-40 (9th Cir. 2004).

These cases arose in a wide range of statutory and factual contexts, demonstrating the universality of these principles and the urgent necessity for national uniformity of the law, but they all vindicate the *Steel Co.* analysis that the mere absence of a valid, as opposed to arguable, cause of action does not implicate subject-matter jurisdiction, which the Sixth Circuit not only ignored, but rejected in the case below. Some examples not already discussed *supra* are:

- As long as a plaintiff has pled the allegations necessary to a Title VII action,

the mere fact that the defendant employer turns out not have the statutorily required fifteen employees does not mean the district court lacks jurisdiction; it means the plaintiff loses on the merits. *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 364-65 (2d Cir. 2000); *see also Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 79-83 (3d Cir. 2003) (performing an extensive *Steel Co.*-type analysis to conclude, *despite adding to a circuit split*, that the 15-employee requirement in a Title VII action is a substantive element of a Title VII and not a matter implicating subject-matter jurisdiction).

- As long as a plaintiff bringing a 30 U.S.C. § 1270 claim alleges that the relevant government authority has failed to perform duties that are nondiscretionary and arise under Chapter 25 of Title 30 of the United States Code, and even if a defendant can later show that the duties are discretionary or do not arise under Chapter 25, dismissal for failure to state a claim, not for lack of jurisdiction, would be appropriate. *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 299 (4th Cir. 2001).

- The plain language of section 2(a) of the Robinson-Patman Act suggests that any inquiry into competition or into competitive relationships tests a plaintiff's prima facie case and not jurisdiction, a holding supported by *Steel Co.* analysis. *Godfrey v.*

Pulitzer Publishing Company, 161 F.3d 1137, 1141-42 (8th Cir. 1998).

- As long as the plaintiff presents a credible legal argument and appropriate factual allegations that would show that he is entitled to recover for employment discrimination under Title II of the Americans with Disabilities Act, whether Title II actually does permit such a recovery as a matter of law does not implicate that district court's jurisdiction to decide the case that it must address *sua sponte*. *Davoll v. Webb*, 194 F.3d 1116, 1128-30 (10th Cir. 1999).

Of course, not every circuit gives full voice to *Steel Co.*'s explanation of when jurisdiction ends and merits considerations begin. Title VII's "fifteen-employee rule" is an example. Discussing and rejecting *Da Silva*, which followed *Steel Co.*, both the Fifth Circuit and the Eleventh Circuit, not unlike the Sixth Circuit in this case vis a vis § 301, clung to prior precedent to hold that the requirement is jurisdictional rather than going to the merits, *Arbaugh v. Yelt Corp.*, 380 F.3d 219, 223-25 (5th Cir. 2004); *Morrison v. Amway Corp.*, 323 F.3d 920, 928-29 (11th Cir. 2003), though the Fifth Circuit has discussed *Steel Co.* in other cases. *E.g.*, *Planned Parenthood v. Sanchez*, 403 F.3d 324, 332 (5th Cir. 2005); *Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345 (5th Cir. 2003).

Notably, no Sixth Circuit case yet published cites *Steel Co.* for a holding that a failure to prove an element of the claim goes to the merits, not jurisdiction, even

when a statutory grant of jurisdiction defining the elements of the claim as well is at issue.[2]

The *Steel Co.* analysis, of which *Textron* was really an example, has been adopted by many jurisdictions and applied in numerous contexts. Therefore, the Sixth Circuit's failure to get in line will have implications not simply for § 301 cases, but also for subject matter jurisdiction more generally, perhaps the most important issue a court must face and one that necessarily arises in every case. One of the Supreme Court's primary functions is to correct and clarify these significant uncertainties in federal law exemplified by such a circuit conflict. It should issue a writ of certiorari to settle this matter.

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[2]The Sixth Circuit has cited *Steel Co.*'s rule that the absence of a valid cause of action does not implicate subject matter jurisdiction, but the case concerned standing, not a grant of statutory jurisdiction. *Cutshall v. Sundquist*, 193 F.3d 466, 471-72 (6th Cir. 1999).

(any footnotes trail end of each document)

No. 03-6115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIM BURKLOW et al.,
Plaintiffs-Appellants,
v.
BASKIN-ROBBINS USA, CO. and
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, A.F.L., C.I.O. LOCAL UNION No.
783,
Defendants-Appellees.

January 12, 2005, Filed

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COUNSEL: For JIM BURKLOW, KIRBY CAIN, PHIL CALHOUN, GARY CISSNA, WAYNE DUNCAN, RICKY EPISON, MIKE EVANS, WILLIAM GILLASPIE, BARRY HAGAN, JAMES HATFIELD, MARK HAWKINS, JOE HOFFMAN, MALCOLM HOWARD, CHARLES I. JAMES,

SCOTT KNIGHT, BILL MCDANIEL, CHUCK MITCHELL, SCOTT MULLIGAN, NICK NICELY, GEORGE PAPPAS, JEFF PAYNE, JAROD SIMON, BOBBY SIKES, ROBERT T. SUTHERLAND, ALLEN R. TINSLEY, RONNIE THOMAS, DANNY WATHEN, DARREN WATHEN, ROBBIE BAIZE, ROBERT A. GREATHOUSE, HENRY HEAD, LARRY HENDERSON, JAMES JARBOE, ROGER KEOWN, JEFF KASINGER, DARRELL MCELWAIN, DAVID MIDKIFF, GARY RANSON, RONALD ROBERTS, CARL SNYDER, STEPHEN TEASLEY, JAMES TIGUE, JOHN WATHEN, JOHN PAPPAS, Plaintiff -- Appellant: Charles S. Wible, Owensboro, KY.

For BASKIN-ROBBINS USA, CO., Defendant -- Appellee: Paul M. Heylman, Schmeltzer, Aptaker & Shepard, Washington, DC.

For INTERNATIONAL BROTHERHOOD OF TEAMSTERS, A.F.L., C.I.O. LOCAL UNION 783, Defendant -- Appellee: Herbert Segal, Segal, Stewart, Cutler, Lindsay, James & Berry, Louisville, KY.

JUDGES: Before: DAUGHTREY and GILMAN, Circuit Judges; and RICE, District Judge. *

OPINIONBY: RONALD LEE GILMAN

OPINION: RONALD LEE GILMAN, Circuit Judge. Jim Burklow and 22 other former employees of a closed Baskin-Robbins ice cream plant in Owensboro, Kentucky (Plaintiffs) brought a hybrid action under § 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), against their employer and

the International Brotherhood of Teamsters, Local Union 783. The Plaintiffs alleged that Baskin-Robbins violated the parties' collective bargaining agreement and that the Union breached its duty of fair representation in connection with the plant closing. After finding that a plant closing agreement superseded the collective bargaining agreement, the district court dismissed the complaint on the basis that it had no jurisdiction under § 301(a) to determine the validity of the closing agreement.

On appeal, the Plaintiffs' principal argument is that the Sixth Circuit cases relied on by the district court, Adcox v. Teledyne, Inc., 21 F.3d 1381 (6th Cir. 1994), and Heussner v. National Gypsum Co., 887 F.2d 672 (6th Cir. 1989), are no longer good law after the Supreme Court's decision in Textron Lycoming Reciprocating Engine Division v. UAW, 523 U.S. 653, 140 L. Ed. 2d 863, 118 S. Ct. 1626 (1998). Following the parties' submission of their briefs in the present case, however, the Sixth Circuit addressed this argument in Bauer v. RBX Industries, Inc., 368 F.3d 569 (6th Cir. 2004). This court in *Bauer* held that after

comparing (1) our precedents in *Adcox* and *Heussner* and (2) the general principle that federal courts have limited jurisdiction in this area, with a lone ambiguous statement by the Supreme Court [in *Textron*], we believe that our prior rulings that a federal court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract are still binding on us.

Id. at 579 n.5. In considering the Plaintiffs' argument in the present appeal, "we are bound by the published

opinions of previous panels." Grundy Mining Co. v. Flynn, 353 F.3d 467, 479 (6th Cir. 2003).

After carefully considering the record on appeal, the briefs of the parties, and the applicable law, and having had the benefit of oral argument, we conclude that the district court did not err in granting summary judgment to the defendants. Because the reasoning that supports the judgment for the defendants has been clearly articulated by the district court in a thorough and comprehensive opinion, and because this court's subsequent ruling in Bauer is controlling, the issuance of a detailed written opinion by us would be unduly duplicative. Accordingly, the judgment rendered by the Honorable Joseph H. McKinley, Jr., United States District Court Judge for the Western District of Kentucky at Owensboro, is AFFIRMED on the basis of the reasoning detailed in his Memorandum Opinion and Order dated July 22, 2003.

Footnote

*The Honorable Walter H. Rice, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

CIVIL ACTION NO. 4:01-CV-147-M
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, OWENSBORO DIVISION

JIM BURKLOW, ET AL., PLAINTIFFS

v.

BASKIN-ROBBINS USA, CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, A.F.L., C.I.O. LOCAL UNION NO. 783, DEFENDANTS

JUDGMENT

July 22, 2003, Decided

This matter having come before the Court on motions for summary judgment filed by defendant, Baskin-Robbins USA, Co. [DN 42], and by co-defendant, International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783 [DN 45], and the Court on this date having issued a Memorandum Opinion and Orders addressing said motions,

IT IS HEREBY ORDERED that both motions for summary judgment are GRANTED.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

Joseph H. McKinley Jr.
Judge, United States District Court

CIVIL ACTION NO. 4:01-CV-147-M

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, OWENSBORO DIVISION

JIM BURKLOW, ET AL.,
PLAINTIFFS

v.

BASKIN-ROBBINS USA, CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, A.F.L., C.I.O. LOCAL UNION NO. 783,
DEFENDANTS

MEMORANDUM OPINION AND ORDERS

7/22/03

This matter is before the Court on motions for summary judgment filed by Defendant, Baskin-Robbins USA, Co. ("Baskin-Robbins") [DN 42], and by Co-Defendant, International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783 ("Local 783" or "the Union") [DN 45]. Having been fully briefed, these matters now stand ripe for decision: For the reasons set forth below, both motions are GRANTED.

I. BACKGROUND

This case arises from the closing of the Baskin-Robbins ice cream plant in Owensboro, Kentucky. Plaintiffs are

former Baskin-Robbins employees who, at all tunes pertinent to this litigation, were represented by Local 783. In 1998, Baskin-Robbins and Local 783 negotiated a collective bargaining agreement ("1998 CBA") effective through 2002. During those negotiations, the Union expressed concern about the possibility that Baskin-Robbins might sell the plant to another employer who would reduce employee wages or benefits. In response to this concern, Baskin-Robbins agreed to an Addendum to the 1998 CBA, entitled "Successors and Assigns Clause" ("S&A Clause"), requiring it to pay the greater of $1 million or all wages and benefits due under the agreement in the event that the plant was sold to a buyer that refused to abide by its terms.

On January 12, 2001, Baskin-Robbins announced that, as a result of its decision to outsource the manufacture of its ice cream to Dean Foods, the Owensboro plant would cease operations on March 15, 2001. On January 16, 2001, the Union filed a grievance under the 1998 CBA claiming that the plant closing was covered by the S&A Clause and that the employees were therefore entitled to their wages and benefits due for the remainder of the agreement or $1 million, whichever was greater. Baskin-Robbins denied the grievance, however, maintaining that the S&A Clause only applied in the event that the plant was sold to a "successor employer" and did not apply to a plant closing.

On January 25, 2001, Baskin-Robbins and Local 783 engaged in "effects bargaining" to resolve the impact of the plant closing on the employees. By the end of the second day of negotiations, Baskin-Robbins had presented a "last, best and final offer" to the Union

which included: (1) a cash payout to each employee based on the employee's years of service; (2) a payout of accumulated sick pay; (3) six months of company-paid health insurance continuation; (4) a cash productivity bonus; and (5) a program to assist employees in finding new employment.

Baskin-Robbins' "last, best, and final offer" was subsequently memorialized in a letter ("Offer Letter") from Baskin-Robbins' counsel to Union representative Jerry Vincent ("Vincent"). The Offer Letter set forth the terms of Baskin-Robbins' offer and made it clear that "this last, best and final offer represents the Company's proposal for full settlement of all matters arising at the Owensboro plant, including the plant closing and pending grievance regarding same." (Letter from Paul Heylman to Vincent of 02/02/01, at 3.)

On February 25, 2001, the Union convened a meeting to vote on whether to accept or reject the terms of Baskin-Robbins' offer. As set forth above, the Offer Letter clearly stated that acceptance of the offer would settle all claims relating to the Owensboro plant, including the pending grievance. At the ratification meeting, however, Vincent allegedly assured the employees that acceptance of the offer would have no bearing on their ability to pursue the grievance. Ultimately, the employees voted to accept Baskin-Robbins' offer by a margin of 59-17.

After the vote, Union business representative Todd Thomason ("Thomason") formally accepted Baskin-Robbins' offer on behalf of the Union by writing "Accepted and Agreed" and signing his name on the last page of the Offer Letter. Soon thereafter, the parties

executed a new agreement reaffirming Thomason's acceptance of the Offer Letter, but providing an exception in the event that Baskin-Robbins sold the plant to another company that manufactured ice cream during the term of the 1995 CBA. The parties' new agreement ("Closing Agreement") expressly provided that:

This agreement is a full settlement and release of all grievances and claims relating to the plant closing and the contract. Specifically, the parties agree that there will be no claim raised that the Company was obligated to pay out anything more than the Company's last, best and final offer of February 1, 2001. . . .

Baskin-Robbins proceeded to pay out all amounts due under the Closing Agreement. Nonetheless, many of the former employees felt that they had been deceived throughout the plant closing process by both their employer and their union - especially regarding their ability to pursue the grievance. As a result, on August 31, 2001, Plaintiffs initiated the present lawsuit. Plaintiffs' original complaint asserted a "hybrid" claim under the Labor Management Relations Act ("LMRA") alleging that Baskin-Robbins had breached the 1995 CBA and that the Union had violated its duty of fair representation. On October 11, 2401, Plaintiffs fled an amended complaint, adding state law claims for fraud and civil conspiracy and attempting to join sixteen "new plaintiffs" not named in the original complaint. Baskin-Robbins and the Union (collectively "Defendants") now. move for summary judgment on Plaintiffs' claims against them.

II. STANDARD OF REVIEW

In order to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty Lobby, .Inc., 477 U.S. 242, 247-48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574, 586 (1986). The Rule requires the non-moving party to present "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson, 477 U.S. at 252.

III. DISCUSSION

In support of their respective motions for summary judgment, Defendants argue: (1) that this Court does not have subject matter jurisdiction over Plaintiffs'

"hybrid" claim; (2) that Plaintiffs' state law claims are preempted by federal law; and (3) that even if this Court were to reach the merits of Plaintiffs' federal and state claims, those {claims are nonetheless insufficient to withstand summary judgment. In addition, Defendants contend that the claims of the sixteen "new plaintiffs" are time barred and must be dismissed.

A. Section 301 "Hybrid" Claim

Plaintiffs' "hybrid" claim, brought pursuant to Section 301 of the LMRA, alleges that Baskin-Robbins breached the 1998 CBA and that the Union violated its duty of fair representation. The Court will consider each part of Plaintiffs' "hybrid" claim in turn.

1. Section 301 Claim Against Baskin-Robbins

Section 301 (a) of the LMRA provides that suits for "violation of contracts between an employer and a labor organization" may be brought in federal district court. 29 U.S.C. § 185(a). "Thus, under Section 301(a), district courts possess subject matter jurisdiction in cases involving an alleged violation of an existing collective bargaining contract." Heussner v. Nat'l Gypsum Co., 887 F.2d 672, 676 (6th Cir 1989). In this case, however, Defendants contend that this Court does not have subject matter jurisdiction over Plaintiffs' Section 301 claim against Baskin-Robbins because adjudication of that claim would first require the Court to adjudicate the validity of the Closing Agreement which superseded the 1995 CBA. In support of their contention, Defendants cite the Sixth Circuit's decision Adcox v. Teledyne Inc., 21 F.3d 1381(6" Cir. 1994).

In Adcox, as here, the employer and local union engaged in "effects bargaining" after the employer announced its intention to cease operations. The union demanded that the employer provide the employees with various benefits, including continuation of health insurance and early pension benefits for all employees regardless of the length of service. In addition, the union sought certain "special distribution" benefits (essentially severance pay) provided for in a collectively bargained "Service Award Agreement." The employer agreed to the union's demand for continued health insurance, but refused to pay the early pension benefits or special distribution benefits. Thereafter, following a majority vote by the employees, the union and the employer entered into a Plant Closing Agreement wherein the employer agreed to certain concessions in exchange for the union's comprehensive release of all claims, including a release concerning the special distribution benefits. Sometime after the Plant Closing Agreement was implemented, the employees brought a Section 301 "hybrid" claim alleging that the employer's failure to pay the special distribution benefits was a breach of contract under Section 301 and that the union had violated its duty of fair representation under Section 9(a) of the LMRA. The district court, however, dismissed the plaintiffs' "hybrid" claim for lack of subject matter jurisdiction, concluding that the collective bargaining agreement had been superseded by the Plant Closing Agreement and that it lacked jurisdiction to determine the validity of the superseding agreement.

The Sixth Circuit Court of Appeals, citing its earlier decision in Huessner v. National Gypsum Co., 887 F.2d

672, 676 (6th Cir. 1989) subsequently affirmed the district court's ruling, noting that:

In [Huessner], we determined that a district court lacked jurisdiction under § 301 (a) over questions of the validity of collective bargaining contracts. Thus, the district court here properly determined that it lacked jurisdiction to entertain a challenge under § 301 to the validity of the Plant Closing Agreement. Because that Agreement superceded the 1988 collective bargaining agreement, including the Service Award Agreement, upon which plaintiffs' § 301 claim against Teledyne depends, there was no breach here that would support a § 301 claim.

Adcox, 21 F.3d 1381 at 1386.

The rule applied in Adcox applies with equal force to the facts presented here.fn1 To find that Baskin-Robbins breached the 1998 CBA, it must first be established that the provisions of that agreement were still in force. The Closing Agreement, however, expressly released all "grievances and claims relating to the plant closing and the contract." The Closing Agreement appears on its face to be a valid and binding collective bargaining agreement which expressly precludes Plaintiffs' claim that Baskin-Robbins breached the 1998 CBA. Thus, in order to prevail on their claims here, the Plaintiffs must prove that the Closing Agreement is not valid and binding. Like the district court in Adcox, however, this Court lacks jurisdiction to determine the validity of the Closing Agreement. Accordingly, Baskin-Robbins is entitled to summary judgment on Plaintiffs' Section 301 claim.

2. Section 301 Claim Against the Union

The second part of Plaintiffs' Section 301 "hybrid" claim alleges that Local 783 violated its duty of fair representation under § 9(a) of the LMRA, 29 U.S.C. § 159(a). "In a hybrid suit under § 301, to recover against either the employer or the union, a plaintiff must show that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation." Adcox, 21 F.3d at 1386 (citing White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir.1990)). As such, "[u]nless [the plaintiff] demonstrates both violations, he cannot succeed against either party." white, 899 F.2d at 560. Here, the Court has already determined that Plaintiffs cannot satisfy the part of the "hybrid" Section 301 test requiring a showing of a breach of a collective bargaining agreement. Thus, the second part of Plaintiffs' "hybrid" claim - that the Union violated its duty of fair representation under Section 9(a) of the LMRA - likewise cannot survive summary judgment.

B. Preemption of State Law Claims

In addition to the § 301 "hybrid" claim discussed above, Plaintiffs assert state law claims for fraud and civil conspiracy. Defendants, however, insist that the Court need not even reach the merits of those claims because they are preempted by federal labor law.

1. Section 301 Preemption

Both defendants contend that Plaintiffs' state law claims are preempted by Section 301 of the LMRA. Section 301 gives federal courts jurisdiction over issues

pertaining to collective bargaining agreements and has been construed by the Supreme Court as a grant from Congress to create a federal common law of labor contracts. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). As such, the Sixth Circuit has held that Section 301 effectively preempts certain state law claims:

Since federal law is the exclusive law used to interpret the duties and obligations contained withing collective bargaining agreements, any state law claim that is not independent of rights established by an agreement, and that is `inextricably intertwined' with a determination of the meaning of the terms of an agreement, is preempted by section 341. Thus, if a state tort relies on or entails interpretation of a collective bargaining agreement, the state claim is preempted.

Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc., 270 F.3d 1018 (6" Cir. 2001) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 217-18 (1985)).

As set forth above, Section 301 has broad preemptive effect. Even so, "[t]he preemptive reach of Section 301. .. is by no means boundless." Fox v. Parker Hannifin Corp., 914 F.2d 795, 799 (6th Cir.1990). Thus, even where a state law claim "requires a court to discuss and evaluate the same, facts as it would when interpreting the agreement," there is no preemption "so long as the court is not actually interpreting the agreement." Northwestern Ohio Adm'rs, 270 F.3d at 1030 (citing Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988)). Stated otherwise, "Section 301 preempts only state law claims that are 'substantially dependent on analysis of a collective bargaining agreement,' . . .

not claims that only 'tangentially' involve CBA provisions. Fox, 914 F.2d at 799-800 (internal citations omitted).

a. Claims Against the Union

Plaintiffs have summarized the factual basis of their fraud claim against the Union as follows

[w]hen the Union discovered [that Baskin-Robbins intended to close the plant], it did nothing to assist the members to protect their rights and even led them to believe they could protect their rights under the successors and assigns clause by entering into a Plant Closing Agreement which on its face settled their good claims for breach of contract under the successors and assigns clause and anticipatory breach ....

(Pls. Resp. to Summ. J. at 25.) Elsewhere, Plaintiffs maintain that the Union made "false statements and omissions of fact. . . in order to induce Plaintiffs into remaining BaskinRobbins employees to their detriment until the plant closed." Id. at 28.

According to Plaintiffs, preemption under Section 301 is not warranted because "[t]hese misrepresentations, . . . do not require interpretation of any contract provision to understand." Id. at 25. Although the Court agrees that Plaintiffs' claims would not require interpretation of the 1998 CBA, those claims are nonetheless preempted because they implicate the same facts underlying Plaintiffs' claim for breach of the duty of fair representation.

"An action for breach of duty of fair representation that directly implicates the grievance procedure of a collective bargaining agreement 'clearly falls within the ambit of section 301 preemption.'" In re Glass, Molders, Pottery, Plastics &.Allied Workers Int'l Union, 983 F.2d 725, 728 (6th Cir.1993) (quoting Fox v. Parker Hannifin Corp., 914 F.2d 795, 802 (6 th Cir. 1990)). As such, where a plaintiff's state law tort claim is based upon the same factual allegations as his federal claim for breach of the duty of fair representation, the state claim is effectively preempted by federal labor law. See id. at 729 (holding that plaintiff's state law claims against union were preempted by federal law where state claims were related to union's duty of fair representation).

The Court finds that most, if not all, of the allegations set forth above arise from essentially the same facts and circumstances as Plaintiffs' claim for breach of the duty of fair representation. For example, in describing the conduct pertinent to their duty of fair representation claim, Plaintiffs' Amended Complaint alleges, inter alia, that the Union

failed to fairly represent the Plaintiffs by informing members that they had to stay until the plant closed . . . in order to get their contract benefits, [and] by leading the Plaintiffs to believe that the contract liquidated damages clause would be addressed at a later date pursuant to the grievance procedure set out in the collective bargaining agreement, by leading the Plaintiffs to believe the severance package was separate from the liquidated damages clause . . . .

(Pls.' Am. Compl, Sec. XVI.) This conduct, it seems, is more or less identical to the conduct underlying Plaintiffs' fraud allegations. Accordingly, the state law fraud claims asserted against the Union are preempted by Section 301.

b. Claims Against Baskin-Robbins

Plaintiffs have stipulated that their fraud claim against Baskin-Robbins relates exclusively to its alleged representations - verbal and otherwise[fn2] - that the Owensboro plant would remain viable for the duration of the 1998 CBA.[fn3] These alleged representations, however, appear to have been made independent from any promises contained in the 1998 CBA. As such, determining whether these representations were fraudulent would not require the Court to analyze or interpret the terms of the agreement. Thus, it cannot be said that the alleged representations regarding the future of the Owensboro plant are, so "inextricably intertwined" with interpretation of the 1998 CBA as to be preempted by Section 301.

2. Garmon Preemption

In the alternative, Baskin-Robbins argues that the state law claims asserted against it are preempted by the rule in San Diego Building Trade v. Garmon, 359 U.S. 236 (1959). Under Garmon, "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 245. As such, "[t]he party arguing Garmon preemption

bears the burden of showing that the conduct at issue is prohibited or protected by the [NLRA]." Northwestern Ohio Adm'rs, Inc., 270 F.3d at 1027 (citing Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 395 (1986).

Section 8(d) of the NLRA requires employers to bargain in good faith with respect to "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d).fn4 Plaintiffs' Amended Complaint alleges that Baskin-Robbins made a host of fraudulent misrepresentations, including some that fall squarely within the scope of the NLRA.fn5 In an effort to avoid Garmon, however, Plaintiffs now insist that "claims based on fraud and misrepresentations that infected the bargaining process and might constitute violations of the employer's duty to bargain in good faith, are not before the Court. . . ." (Pls.' Resp. to Summ. J. at 28.) Instead, Plaintiffs insist that their state law fraud claims

are based on Baskin-Robbins' and the Union's false statements and omissions of fact, including Baskin-Robbins' intention to close the Owensboro plant, and the nature of Plaintiffs' rights under the various collective bargaining agreements at issue, in order to induce Plaintiffs into remaining Baskin-Robbins employees to their detriment until the plant closed and to interfere with their (non-bargaining) rights to their detriment under the various contracts, such as pursuit of their rights under the successors and assigns clause.

(Pls.' Resp. to Sunup. J. at 28) (underlining in original).

Although not a model of clarity, the above-quoted language appears to stipulate that Plaintiffs' fraud claims against Baskin-Robbins arise exclusively from its alleged misrepresentations regarding its intention to close the Owensboro plant - i.e., representing to the employees that the plant would continue to operate for the duration of the 1998 CBA. As such, the Court must determine whether such representations, if proven, would constitute conduct that is arguably prohibited by the NLRA. The Court finds that they would not.

Even if Baskin-Robbins did make false representations regarding the future of the plant to induce employees to remain there, such representations would not have implicated Baskin-Robbins' duty to bargain in good faith. The alleged representations were not made during the collective bargaining process, but rather, were made after the 1998 CBA was negotiated in an effort to deter the employees from seeking other employment. Thus, because Baskin-Robbins has failed to carry its burden of establishing that the conduct at issue is arguably prohibited by the NLRA, the Court finds that Plaintiffs' state law claims against Baskin-Robbins are not preempted by Garmon.

C. Remaining State Law Claims

As set forth above, of the myriad of fraud allegations set forth in Plaintiffs' Amended Complaint, only one survives preemption - namely, the allegation that Baskin-Robbins conspired with the Union to fraudulently induce employees to remain at the Owensboro plant by representing that the plant would remain viable for the duration of the 1998 CBA. Under Kentucky law, a plaintiff asserting fraud must prove six

elements to prevail: (1) a material representation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999) (citing Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. Ct. App. 1978)). Civil conspiracy, in turn, requires that a plaintiff prove "an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act." James v. Wilson, 95 S.W.3d 575, 897 (Ky. Ct. App. 2002) (citing Montgomery Milam, 910 S.W.2d 237, 239 (Ky. 1995)).

The Court finds that Plaintiffs have failed to establish genuine issues of material fact as to the required elements of their non-preempted state law claims. Plaintiffs' allegations of fraud and conspiracy rest entirely on vague generalizations with no specific proof. For example, as to Plaintiffs' fraud claim against Baskin-Robbins, the record is devoid of any specific evidence that Baskin-Robbins ever made a material representation regarding the future of the plant outside of the collective bargaining process.fn6 Nor is there any evidence suggesting that Baskin-Robbins ever conspired with the Union to mislead the employees in any way. In the absence of such specific evidence, Plaintif state law claims for fraud and civil conspiracy cannot survive summary judgment.

IV. CONCLUSION AND ORDERS

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDEREI that the motions for summary

judgment by Baskin-Robbins [DN 42] and the Union [DN 45] are GRANTED.fn7

This the 22day of July, 2003.

Footnotes

fn1 Plaintiffs' contention that Adcox was implicitly overruled by the United States Supreme Court's decision in Textron Lycoming Reciprocating, Engine Div., AVCO Corp. v. U.A.W., 523 U.S. 653 (1998) is unpersuasive. That case stands for the proposition that "if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense." Id. at 658 (citation omitted). In the present case, however, the 1998 CBA was expressly superceded by the Closing Agreement, and Defendants do not assert any affirmative defenses relating to the validity of the Closing Agreement. Thus, Textron is inapposite; Adcox and Huessner remain the law in the Sixth Circuit and so govern the outcome of this case.

fn2 In addition to any verbal assurances made by Baskin-Robbins, many employees also interpreted Baskin-Robbins' capital expenditures to improve the Owensboro plant as evidence that the plant would continue to operate.

fn3 See Part III.B.2. infra.

fn4Section 7 of the NLRA - not at issue here - concerns the right of employees to organize and bargain collectively.

fn5For instance, Plaintiffs Amended Complaint alleges that Baskin-Robbins made fraudulent misrepresentations (1) regarding the future of the Owensboro plant during negotiation of the 1998 CBA; and (2) regarding the ratification of the Plant Closing Agreement.

fn6 Plaintiffs' only evidence of a specific representation made by Baskin-Robbins regarding the future of the plant appears in the deposition testimony of Plaintiff Ronnie Thomas ("Thomas"). According to Thomas, Baskin-Robbins negotiator Rick Morris made verbal assurances to the employees that they were guaranteed work for four years. (Thomas Dep. at 55.) Those alleged assurances, however, were made during collective bargaining of the 1998 CBA. Hence, any claim based on Morris's statements would be preempted by Garmon.

fn7Having granted summary judgment in favor of Defendants on all of Plaintiffs' claims, the question of whether the claims of the "new plaintiffs" are time barred is moot.

No. 03-6115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIM BURKLOW et al.,
Plaintiffs-Appellants,
v.
BASKIN-ROBBINS USA, CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, A.F.L., C.I.O. LOCAL UNION No. 783,
Defendants-Appellees.

5/7/2005

ORDER

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and RICE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER of THE COURT

*Hon. Walter H. Rice, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

FILED
SEP 9 - 2005
CLERK

No. 05-201

In the Supreme Court of the United States

JIM BURKLOW, ET AL.,

Petitioners,

v.

BASKINS-ROBBINS USA, CO., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Section 301(a) of the Labor Management Relations Act states that district courts shall have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . ." 29 U.S.C. § 185(a). The question presented for review is the following:

> Whether the courts below properly held that the District Court lacked subject matter jurisdiction under Section 301 to enforce a superceded labor agreement because the court would first be required to invalidate the existing labor agreement.

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BRIEF OF RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 783, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Proceedings Below.

The Petitioners filed this action as a "hybrid" action pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, alleging that their employer, Baskin-Robbins USA, breached its 1998 Collective Bargaining Agreement ("CBA") with the Union, of which the Petitioners were members, when Baskin-Robbins closed its plant in Owensboro, Kentucky. The Petitioners' Complaint alleges a cause of action against Baskin-Robbins for breach of the 1998 CBA and against the Union for breach of its duty of fair representation in handling a grievance filed over the plant-closing (the "Hamlet grievance").

After the Hamlet grievance was filed, Baskin-Robbins and the Union executed a new labor agreement (the Plant-Closing Agreement) that provided substantial benefits to Union members and expressly settled all grievances and claims relating to the plant closing and the 1998 CBA. As correctly noted by the District Court, the Petitioners could only prevail on their claims under the 1998 CBA if they proved that the Plant Closing Agreement was not valid and binding. The District Court concluded that, under the Sixth Circuit's rulings in *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1385-86 (6th Cir. 1994) and *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989), it lacked subject matter jurisdiction to invalidate the Plant Closing Agreement, and thus lacked

jurisdiction over the Petitioners' Section 301 claim against Baskin-Robbins. [R.84, Memorandum Opinion and Orders, pgs. 6-9, Apx. pgs. 47-50.] Lacking jurisdiction over the Petitioners' Section 301 claim against Baskin-Robbins, the District Court concluded that it also lacked jurisdiction to hear their breach of duty of fair representation claim against the Union, citing *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559-560 (6th Cir. 1990). [R.84, Memorandum Opinion and Orders, pg. 9, Apx. pg. 50.]

In a short unpublished decision,[1] the Court of Appeals for the Sixth Circuit rejected the arguments raised by the Petitioners here. The Sixth Circuit reaffirmed its prior holdings in *Adcox* and *Heussner* that a federal court does not have jurisdiction to hear a § 301 claim premised upon a superceded labor contract.

B. Clarification of the Record.

The Union disputes two allegations contained in the Petitioners' Statement of the Case. There is no evidence supporting the Petitioners' claim that the employees voted to ratify the Plant Closing Agreement in reliance on any "deception" from the Union. Nor is there any evidence supporting the Petitioners' claim that the Union (Teamster Local Union 783) also represented workers at the Chicago Dean Foods Plant, to which Baskin-Robbins subcontracted production upon closure of the Owensboro, Kentucky, plant.

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[1] Pursuant to Sixth Circuit Rule 28(g), citation to unpublished decisions in briefs and oral arguments before the Sixth Circuit is disfavored.

After Baskin-Robbins announced the plant closing, the Union took the following actions to protect the interests of employees: the Union filed a grievance under the successors and assigns clause of the 1998 CBA (the "Hamlet grievance"); negotiated a Plant Closing Agreement with Baskin-Robbins that contained a substantial severance package for employees (including the Petitioners); and submitted the new agreement to the Union's membership for a ratification vote. The Petitioners have presented no evidence to support their contention that the employees voted to ratify the Plant Closing Agreement based on alleged misrepresentations made by the by Union's Secretary Treasurer that ratification would have no effect on the pending Hamlet grievance under the successors and assigns clause of the 1998 CBA. [Cert. Petition, pg 3.] Multiple written communications to employees from both the Union and Baskin-Robbins stated unequivocally that employees had the choice of either ratifying the Plant Closing Agreement with its severance benefits or pursuing the Hamlet grievance, but not both.[2] At

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[2] [R.45, Union Exhibit 3, Apx pg 95 (Union memo updating employees on negotiations with Baskin-Robbins over the plant closing); R.45, Union Exhibit 4, Apx pg 96 (Union memo advising employees that it is trying to negotiate a settlement. "Then it will be up to [you] to decide whether or not to accept that offer to challenge what you think is rightfully yours."); R.45, Union Exhibit 5, Apx pgs 97-111 (Union memo enclosing (a) "Baskin-Robbins's last, best and final offer to fully settle all issues relating to the Owensboro plant, including the plant closing and the pending grievance on same" and (b) an opinion letter from the Union's attorney discussing the successors and assigns clause, and an arbitration decision on a similar issue); R.45, Union Exhibit 6, Apx pgs 112-117 (Baskin-Robbins' answers to "frequently asked questions" stating that employees will be asked to choose between two options).]

no time did the Union mislead its members and, had the Petitioners' claims not been dismissed on jurisdictional grounds, they would have been dismissed on the merits.

The Petitioners also claim that the Union represented the workers "who ended up with Baskin-Robbins' business after the Owensboro plant closure." [Cert. Petition, pg. 3.] However, the Union representing the employees in Owensboro was Teamsters Local 783, headquartered in Louisville. It is undisputed that Local 783 had no contracts with Dean Foods and represented no employees outside the state of Kentucky. Pursuant to jurisdictional rules, Local 783 could not have represented the employees of the Dean Foods plant in Chicago even if the employees had wanted it to and Dean Foods had consented. Moreover, it is undisputed that the Union officials who met with employees at the Owensboro Baskin-Robbins plant were officials of Local 783, not officials of the local representing Dean Foods employees in Chicago and not officials of the international union. It is further undisputed that Local 783 had its own governance structure, received dues only from the members of its own local, paid its own staff and officers, and bargained directly with the employers with whom it had contracts. Contrary to the Petitioners' accusations, Local 783 had no incentive to sell out its members for the benefit of another union – even another Teamsters local. Local 783 had nothing to gain and everything to lose from closure of the Owensboro Plant and severance of its employees.[1]

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[1] Nether the international Union nor the Chicago local was made a party to this action.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S RULING IN *TEXTRON LYCOMING ENGINE DIV. V. UAW*

In *Textron Lycoming Engine Div. v. UAW*, 523 U.S. 654 (1998), this Court held that, where a plaintiff's suit seeks to void a Section 301 agreement (on grounds such as fraud and misrepresentation), rather than enforce one, federal courts lack jurisdiction to hear the action, absent a claim that the labor agreement in question has been violated. Quoting from Section 301, this Court stated that "'Suits for violation of contracts' under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." 523 U.S. at 657, quoting 29 U.S.C. § 185(a).

The lower courts' decisions in this case and the Sixth Circuit precedent upon which they are based are not in conflict with *Textron*. To the contrary, cases like *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1385-86 (6th Cir. 1994) and *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989), are properly viewed as a specific application of the *Textron* principle to a case in which the labor agreement that has allegedly been violated has been superceded by a subsequent labor agreement. Like the labor union in *Textron*, the Petitioners here seek to void a Section 301 agreement – namely, the Plant Closing Agreement. Indeed, only if the Plant Closing Agreement is declared void can Petitioners proceed with their claims alleging violation of the successors and assigns clause of the 1998 CBA. As noted by the District Court, "in order to prevail on their claims here, the Plaintiffs must prove that the [Plant] Closing Agreement is not valid and binding. [R.84, Memorandum Opinion and Orders, pg.

8, Apx. pg. 49, citing *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994).] Under *Textron*, the District Court lacked jurisdiction to invalidate the Plant Closing Agreement unless it was necessary to do so in order to resolve a claim for violation of that agreement. But in this case, no party made a claim that the Plant Closing Agreement had been violated.[4]

In apparent recognition that the actual holding in *Textron* undermines their arguments, the Petitioners focus instead on the following dicta from the *Textron* opinion:

> This does not mean that a federal court can never adjudicate the validity of a contract under § 301(a). That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus, if in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that a contract is invalid, the court may, consistent with § 301, adjudicate that defense.

Textron, 523 U.S. at 657-658. Thus, if the claim before the District Court in this case had been for violation of the Plant Closing Agreement, and the Respondents had raised an affirmative defense that the Plant Closing Agreement was invalid, the language quoted above indicates that the District Court would have had jurisdiction to adjudicate both the claim

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[4] As noted by Baskin-Robbins, the Petitioners waited until after Baskin-Robbins had paid out the severance benefits to employees and satisfied its obligations under the Plant Closing Agreement before filing this action.